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In the Supreme Court of the United States

OCTOBER TERM, 1970.

No. 204.

JAMES EDWARD CRAMPTON,
Petitioner,

vs.

THE STATE OF OHIO,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

BRIEF FOR THE ATTORNEY GENERAL OF OHIO AS AMICUS CURIAE

OPINION BELOW.

The opinion of the Supreme Court of Ohio (A. 82)[1] is reported at 18 Ohio St. 2d 182, 248 N.E.2d 614 (1969).

JURISDICTION.

The Supreme Court of Ohio entered judgment on June 11, 1969 (A. 82). The petition for a writ of certiorari was filed July 31, 1969, and was granted June 1, 1970, limited to questions 2 and 3 of the petition (A. 89). The jurisdiction of this Court rests on 28 U.S.C. §1257(3).

[1] "A" denotes references to the appendix which has been previously filed herein.

QUESTIONS PRESENTED.

1. Whether the Ohio statute which provides that the trier of facts shall determine both guilt and punishment in a single verdict in cases of murder in the first degree violates petitioner's right to be free from self-incrimination.

2. Whether the Ohio statute which provides that the trier of fact may grant or withhold a recommendation of mercy in cases of murder in the first degree, and which provides no standards or criteria to assist the trier of facts in making such determination, violates petitioner's right to due process and equal protection of the law.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

This case involves the Fifth and Fourteenth Amendments to the Constitution of the United States.

The statutes of the State of Ohio involved in this case are Section 2901.01 of the Ohio Revised Code:

> No person shall purposely and either of deliberate and premeditated malice, or by means of poison, or in perpetrating or attempting to perpetrate a rape, arson, robbery, or burglary, kill another.
>
> Whoever violates this section is guilty of murder in the first degree and shall be punished by death unless the jury trying the accused recommends mercy, in which case the punishment shall be imprisonment for life.
>
> Murder in the first degree is a capital crime under Section 9 and Section 10 of Article I, Ohio Constitution.

and Section 2947.05 of the Ohio Revised Code:

Before sentence is pronounced, the defendant must be informed by the court of the verdict of the jury, or the finding of the court, and asked whether he has anything to say as to why judgment should not be pronounced against him.

STATEMENT.

Petitioner James Edward Crampton was indicted in March of 1967 for murder in the first degree in the killing of his wife. After conferring with his attorneys, Crampton raised the question of whether he was presently sane and could stand trial (A. 1). A local psychiatrist examined Crampton pursuant to the trial court's order and found Crampton presently sane (A. 1). Crampton then pleaded not guilty and not guilty by reason of insanity (A. 4). The trial court, pursuant to the Ohio statute,[2] ordered Crampton committed to a state mental hospital for one month where psychiatric tests were conducted (A. 1). A hearing was then held on the psychiatric report at which it was reported to the trial court that Crampton understood the nature of the charge and could counsel in his own defense (A. 1). The trial court then ordered the case to trial before a jury. Crampton had the right, but did not assert it, to have the case tried by a three-judge panel instead of a jury.[3]

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[2] Ohio Rev. Code § 2945.40 (Page's 1954):

> In any case in which insanity is set up as a defense, or in which present insanity of the accused is under investigation by a court or jury, the court may commit the defendant to a local hospital for the mentally ill, or the Lima State Hospital, where the defendant shall remain under observation until such time as the court directs not exceeding one month. . . .

[3] Ohio Rev. Code § 2945.05 (Page's 1954). *Cf.* footnote 50, *infra*, and accompanying text.

The trial began on October 24, 1967, and was concluded on October 30, 1967 (A. 2). At the trial Crampton introduced substantial evidence of his history of drug addiction, criminal acts, marital difficulties, psychiatric diagnosis and family problems (A. 49-59). Mr. John J. Callahan, Crampton's counsel, introduced such evidence through the direct examination of Crampton's mother and by the introduction of Crampton's medical records. Crampton was able to establish a virtually complete biography, as well as to introduce summaries of his personality and background by two doctors, two psychologists, two psychiatrists and a social worker (A. 5-31, 49-59). Such evidence included (a) his father's alcoholism and death of tuberculosis (A. 6, 7, 26, 50), (b) his sister's death of polio (A. 27), (c) his parents' divorce while he was quite young (A. 7, 13, 26, 49), (d) his maltreatment by his stepfather (A. 7, 27), (e) the fact that he was forced to leave home at age 14 (A. 50), (f) the serious concussion he received as a child (A. 14, 53), (g) his brother's commitment to a mental hospital after a record of alcoholism, addiction and incarceration (A. 7, 10, 13, 27), (h) his good grades while in high school (A. 51), (i) the fact that he has a son (A. 7, 10, 16, 54), (j) his lung operation (A. 8, 10, 21, 29), (k) his average-or-better I.Q. (A. 24, 30), (l) the fact he took advantage of his prison experience to finish high school (A. 52), and learn a trade (A. 14) and even (m) his Methodist religion (A. 5). In addition, Crampton's evidence included indications of suicidal tendencies (A. 9, 21, 22, 26), hallucinations (A. 21, 23) and fainting spells (A. 22, 25, 26), and several references to his erratic behavior (A. 8, 11, 15, 16-17, 55). Each witness called by the defense was questioned as to the effect of various drugs and/or Crampton's use of them (Record, pp. 296-97, 351-52, 385, 387, A. 55). Evidence introduced by the defense

included five references to Crampton's Undesirable Discharge from the Navy (A. 21, 23, 27, 29, 52), six references to his juvenile conviction and incarceration in Illinois (A. 23, 24, 26, 27, 30, 51), five references to his adult convictions and prison records in New York (A. 14, 23, 24, 27, 30), seven references to his conviction and prison record in Michigan (R. 265, A. 11, 14-15, 19, 27, 30, 52), eight references to his Federal conviction and Leavenworth prison record (A. 5, 11, 15, 23, 24, 27, 30, 56), reference to his six months in a Navy stockade (A. 30), three references to his parole violation (A. 15, 20, 30), three references to his drinking alcohol to excess (A. 10, 22-30), seven references to his three marriages and two divorces (A. 10, 15-16, 20, 21, 23, 28, 54-56), and reference to his having threatened his first wife once and the deceased at least twice, striking the latter once, (See A. 9, 10, 17, 19-20, 55), his having walked off his job (A. 11), his mother's having advised the deceased not to marry him (A. 56), and even the fact that he had overdrawn his checking account (A. 11). In addition, the medical reports revealed apparently conflicting statements by Crampton regarding the extent of his education (A. 13, 19, 21, 26, 29), the length of time spent in the Navy stockade (A. 14, 21, 30), the details of the shooting in question (A. 24), the nature of his military discharge (A. 13, 21, 27, 29), and the length of his employment at his last job (A. 21, A. 30).

The jury returned a verdict finding the defendant guilty of murder in the first degree, with no recommendation of mercy.[4] Under the Ohio statute the sentence im-

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[4] A: 2. The trial court charged the jury in accordance with Ohio law: "If you find the defendant guilty of murder in the first degree, the punishment is death, unless you recommend mercy, in which event the punishment is imprisonment in the penitentiary during life."

posed by the jury's verdict was death.[5] On November 15, 1967, accompanied by his counsel, Crampton appeared

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[5] Ohio Rev. Code § 2901.01 (Page's 1954):

No person shall purposely, and either of deliberate and premeditated malice, or by means of poison, or in perpetrating or attempting to perpetrate rape, arson, robbery, or burglary, kill another.

Whoever violates this section is guilty of murder in the first degree and shall be punished by death unless the jury trying the accused recommends mercy, in which case the punishment shall be imprisonment for life.

Murder in the first degree is a capital crime under Sections 9 and 10 of Article I, Ohio Constitution.

Article I, Section 9, Ohio Constitution:

All persons shall be bailable by sufficient sureties, except for capital offenses where the proof is evident or the presumption great. Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted.

Article I, Section 10, Ohio Constitution:

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

before the trial court for sentencing and was asked whether he had anything to say in his own behalf as to why the sentence should not be pronounced.[6] Crampton stated:

> Mr. Crampton: Please the Court, I don't believe I received a fair and impartial trial because the jury was prejudiced by my past record and the fact that I had been a drug addict and I just believe that I didn't receive a fair and impartial trial. That's all I have to say. (R. 439-440)[7]

The trial judge then sentenced Crampton to death (A. 74).

SUMMARY OF ARGUMENT.

I.

The Ohio single-verdict procedure of determining guilt and punishment is constitutional. Petitioner's arguments are all based upon the claimed abridgement of his alleged constitutional right of allocution,[8] yet no such constitutional right exists. The Ohio single-verdict procedure therefore did not force him to waive this alleged right of allocution in order to assert his constitutional privilege against self-incrimination. In arguing that the

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[6] Ohio Rev. Code § 2947.05 (Page's 1954):

> Before sentence is pronounced, the defendant must be informed by the court of the verdict of the jury, or the finding of the court, and asked whether he has anything to say as to why judgment should not be pronounced against him.

[7] "R" denotes the record of the trial court.

[8] Brief *Amici Curiae* on Behalf of Petitioner, Appendix A at p. 2A. In replying to the various arguments presented on behalf of the petitioner, respondent is faced with the difficulty of distinguishing between those arguments raised by petitioner and those raised by the *amici curiae* on behalf of petitioner. Respondent shall henceforth refer to "petitioner" and to "petitioner's *amici curiae*" where necessary to differentiate their respective and sometimes conflicting arguments.

Ohio single-verdict procedure required him to exercise his privilege against self-incrimination at the expense of personal allocution Crampton attempts to bifurcate his trial. This is in direct contradiction to the considered determination of the Ohio Legislature that, in a first degree murder case, there is to be a single trial.[9]

The exercise of the privilege against self-incrimination inherently entails a waiver of the "right to allocution" at some stage. Crampton invoked his Fifth Amendment privilege not to testify. He now argues that there were two instances where this constitutional protection should have applied and that he should have been able to utilize such protection in the first instance and waive it in the second. This argument is analogous to an attempt by a defendant to assert the privilege against self-incrimination and then seek to testify on all issues save his past criminal record. In effect, Crampton attempts to build one constitutional right into two and to benefit no matter which approach he chooses. There is no basis in law or policy for such a construction.

The Ohio single-verdict procedure satisfied Crampton's right to a rational sentencing and, as the record shows, enabled him to present substantial evidence relative to sentencing to the jury. As a result of the evidence presented by these other methods, both Crampton's need to testify relevant to the question of punishment and the effect of prosecutorial cross-examination as a deterrent to

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[9] The legislature has seen fit to assign the issue of punishment to the jury that determines guilt in two other instances: breaking and entering an inhabited dwelling at night, which is punishable by life imprisonment unless the jury recommends mercy, in which case the punishment is 5 to 30 years imprisonment (Ohio Rev. Code § 2907.09 (Page's 1954)), and robbery and unlawful entry of a financial institution, which is punishable by life imprisonment unless the jury recommends mercy, in which case the punishment is not less than 20 years imprisonment (Ohio Rev. Code § 2097.141 (Page's 1954)).

such testimony were virtually eliminated. Crampton's personal statement to the Court prior to the pronouncement of sentence also shows that his failure to testify before sentencing was not prejudicial. The post-sentencing procedure established by the Ohio statute gives effect to personal statements made by Crampton in mitigation of his sentence.

II.

The legislative grant of full and unfettered discretion to the jury denies neither due process nor equal protection of the laws. If anything, such discretion results, in practice, in the imposition of far fewer death sentences than would occur if the jury were restrained by any proposed set of standards. Moreover, since a state legislature could constitutionally provide a mandatory death penalty for persons convicted of murder in the first degree, it may give the jury the right to elect the lesser penalty of life imprisonment if it deems it proper to do so. It is clear that such a legislative decision, allowing the jury trying such a defendant to mitigate the harshness of the presumptive penalty, cannot be attacked as violative of due process.

This Court has implicitly recognized the propriety of the present Ohio system and its counterparts in other states. Crampton raises extremely theoretical arguments, which have been rejected by every court that has considered them. Moreover, the substance of Crampton's arguments is relevant only to the *wisdom* of the decision not to impose standards on the jury, not to the constitutionality of that decision. If the present procedure is constitutional, the fact that some other procedure might be preferable is a determination for the legislature to make. In addition, Crampton totally ignores the actual

consequences of any decision overturning Ohio's practice of not limiting the jury's discretion. Both the applicable law and policy considerations require a denial of petitioner's contention.

ARGUMENT.

I. THE OHIO SINGLE-VERDICT PROCEDURE FOR THE TRIAL OF CAPITAL CASES DID NOT VIOLATE ANY RIGHT GUARANTEED CRAMPTON BY THE CONSTITUTION.

The Ohio statutory procedure fully satisfied Crampton's constitutional right to a fundamentally fair hearing and enabled him to present substantial mitigating testimony in his own behalf prior to sentencing. Crucial to a decision in this case therefore is a clear understanding of what is—and what is not—at issue. Certiorari was not granted as to the constitutionality of capital punishment. Crampton's contentions should be analyzed solely as they bear on the Ohio trial procedure. Under this procedure Crampton introduced psychiatric reports and substantial character evidence into the record prior to the jury's deliberation.[10] His assertions cannot, therefore, revolve around the importance of evidence pertaining to potential mitigating factors. Such evidence was presented here, and could be given effect both at the trial and at subsequent reprieve proceedings.[11] Crampton's precise assertion must be only that he had a constitutionally guaranteed right to speak *personally* to the jury prior to its determination of his sentence.

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[10] See the discussion of this subject, *infra*, fn. 25-35 and accompanying text.

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[11] Personal statements could be introduced prior to sentencing and would have been given effect at subsequent clemency hearings.

Having assumed the existence of such a right, Crampton then attempts to theorize a denial of it. He contends that he was forced to choose between two constitutional rights, that the free exercise of these rights was impermissibly "chilled" and that the denial of personal allocution prevented the jury from rendering a rational sentence. At the core of each of these arguments is the supposed existence of a constitutional "right to allocution." The following discussion demonstrates that this Court has never recognized the existence of such an alleged constitutional right and that Crampton's arguments therefore must fail.

1. Crampton had no constitutional right to allocution prior to sentencing.

Crampton has cited no case which holds that a defendant has a constitutional right to allocution. Several cases have dealt with the right of a defendant to allocution prior to the pronouncement of sentence,[12] but an analysis of these cases discloses that they all arose with reference to Rule 32(a) of the Federal Rules of Criminal Procedure.[13] The right of allocution was not, therefore, predicated upon any constitutional provision. Secondly, these cases all recognized that the right of allocution is not absolute. Even when a trial judge did not permit the accused to speak prior to sentencing, as Rule 32(a) required, reversible error was found only if additional, "aggravating," circumstances were present.

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[12] *See, e.g., Andrews v. United States*, 373 U.S. 334 (1963); *Machibroda v. United States*, 368 U.S. 487 (1961); *Hill v. United States*, 368 U.S. 424 (1961); *United States v. Johnson*, 315 F.2d 714 (2d Cir. 1963), *cert. den.*, 375 U.S. 971 (1964).

[13] The rule, in pertinent part, provides: "Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment."

The limited nature of the Rule 32(a) right of allocution is demonstrated by *Hill v. United States*, 368 U.S. 424 (1961). When Hill appeared for sentencing, the trial judge failed to inquire whether he wished to make a statement in his own behalf. On a subsequent motion to vacate the sentence under 28 U.S.C. §2255, it was asserted that this was a denial of a right guaranteed under Rule 32(a) of the Federal Rules of Criminal Procedure and that Hill should be resentenced. Despite the mandatory nature of Rule 32(a), which clearly created a right to allocution, this Court refused to vacate the sentence, stating:

> The failure of a Trial Court to ask a defendant represented by an attorney whether he has anything to say before sentence is imposed is not of itself an error of the character or magnitude cognizable under a writ of Habeas Corpus. *It is an error which is neither jurisdictional nor constitutional.* It is not a fundamental defect which inherently results in the complete miscarriage of justice, nor an omission inconsistent which the rudimentary demands of fair procedure. [Emphasis added] 368 U.S. at 428.

This Court thus recognized that the Rule 32(a) right to allocution is limited and is not constitutionally required.

As later cases pointed out, *Hill* did not involve any "aggravating circumstances." That is, Hill was not affirmatively denied the opportunity to speak nor was the sentence imposed by a misinformed or uninformed judge. Additionally, Hill made no contention that if he were given the right to speak he would have said anything relevant.

Subsequent cases which dealt with the sentencing requirements under Rule 32(a) have occasionally found the "aggravating" circumstances lacking in *Hill*. In no instance, however, has the Court elevated the require-

ment of Rule 32(a) to the constitutional level.[14] While Crampton may contend that a right of allocution exists, no case directly supports Crampton's claim that a right of allocution exists as a constitutional mandate.

Crampton contends that several cases dealing with the right to be heard prior to conviction support his contentions as to the existence of a constitutional right of allocution.[15] Such cases are readily distinguishable. They dealt only with whether or not the defendant had a hearing. They looked to whether the defendant was present with counsel, had an opportunity to be heard, had the right to cross-examine and the right to offer evidence.

In *Specht v. Patterson*, 386 U.S. 605 (1967)[16] this approach is immediately apparent. Specht was convicted of a sexual offense for which the maximum penalty was ten years imprisonment. Pursuant to the Colorado Sex Offenders Act, the trial court then instituted a second proceeding at which Specht was sentenced, as a menace to society, to an indefinite term of from one day to life imprisonment. This sentence was imposed without any hearing, confrontation, cross-examination, or representation by counsel. Under such circumstances this Court held that the second proceeding was not merely the sen-

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[14] *See, e.g., Andrews v. United States*, 373 U.S. 334 (1963); *Machibroda v. United States*, 368 U.S. 487 (1962); *Green v. United States*, 313 F.2d 6 (1st Cir.), *petition for writ of cert. dismissed*, 372 U.S. 951 (1963).

[15] The opportunity for a hearing has been recognized as a key element in the requirements of procedural due process. *See, e.g., Snyder v. Massachusetts*, 291 U.S. 97 (1934) and *Powell v. Alabama*, 287 U.S. 45 (1932). The discussion in *Powell*, which, in context, states that "indicative of such an approach is the right to be heard by counsel" (287 U.S. 45, 72), shows the limited nature of the "right to be heard."

[16] See also *Mempa v. Rhay*, 389 U.S. 128 (1967) (revocation of probation at a hearing where petitioner was not represented by counsel held to violate the Sixth Amendment guarantees).

tencing process of the first trial but an entirely separate guilt-determining procedure. As such, Specht's Due Process guarantees had been violated.

The rationale of *Specht* and similar cases is neither applicable nor helpful to Crampton's contentions. Here the issue of punishment, along with that of guilt, was submitted to the jury after a full and complete hearing. Moreover, in the present case the sentencing process was an integral part of Crampton's trial for murder and did not constitute a separate guilt determining procedure. An analogy to *Specht* would be appropriate only if the facts were radically altered, for example if Crampton had been convicted of armed robbery and subsequently, without a hearing, had been sentenced to death under a recidivist statute. Such is clearly not the situation here. The authorities cited by Crampton offer neither direct nor analogous support for the existence of a constitutional right to allocution.

2. The Ohio unitary jury system does not infringe upon Crampton's protections against self-incrimination.

The policy of the Constitution is that it is intolerable to force a defendant into a position where he must surrender one constitutional right in order to assert another,[17] and that in the free exercise of such a right his choice must not be unduly burdened.[18] For such a policy to be applicable, however, it must be shown that a choice between two constitutional rights is involved or that a constitutional right is being abridged. Crampton clearly had the right, under the Fifth Amendment, to be protected against self-incrimination.

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[17] *Simmons v. United States,* 390 U.S. 377 (1968).

[18] *United States v. Jackson,* 390 U.S. 570 (1968).

The cases asserted as supporting Crampton's contention all turn on the existence of two clear constitutional protections. The rationale of *Simmons v. United States*, 390 U.S. 377 (1968), is clearly inapplicable to the instant case. Simmons was required, in effect, to waive his protection against self-incrimination in order to suppress illegally seized evidence. In this case, while Crampton undeniably had a constitutional right to be protected against self-incrimination, he had no constitutional right to personally address the jury in mitigation of punishment. Even if such a right had been shown, the alternative modes of presenting mitigating evidence[19] demonstrate that the non-exercise of this right was not harmful to him.

The Ohio unitary jury procedure, as followed by thirty-four other jurisdictions, did not "needlessly chill" Crampton's protection against self-incrimination. The concept of "chilling" has been developed in *United States v. Jackson*, 390 U.S. 570 (1968). That case involved a federal procedure whereby, in determining whether to assert the constitutional guarantee of a jury trial, the defendant's choice was not voluntary, since it was only by requesting a jury trial that he would risk capital punishment. The holding in *Jackson* was that such a procedure needlessly "chilled" the Sixth Amendment guarantee. This principle is clearly inapplicable to this case and is not asserted as controlling. The death penalty can be ordered *by either* a three-judge court or a jury in Ohio.[20]

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[19] See the discussion of these modes, *infra*, fn. 25-35 and accompanying text.

[20] If the defendant waives a jury trial, Ohio Rev. Code § 2945.05 (Page's 1954), or pleads guilty, Ohio Rev. Code § 2945.06 (Page's 1954), a three judge court determines the punishment, Ohio Rev. Code § 2954.06 (Page's 1954), in the same manner and with the same discretion as a jury. *State v. Frohner*, 150 Ohio St. 53, 100, 80 N.E.2d 868 (1948).

Nor does *Jackson* provide a rationale which is analogous to Crampton's contention. The Ohio procedure enables the defendant, even if he does not take the witness stand, to get substantial mitigating evidence into the record.[21] Crampton's decision as to the assertion of his protection against self-incrimination was not, therefore, affected by considerations of the need for mitigating evidence. The ability both to introduce extensive mitigating evidence and yet avoid self-incrimination removes this case from the *Jackson* rationale.

Jackson is also distinguishable on other grounds. The instant case involves a legislative determination by the State of Ohio that the ultimate punishment for murder in the first degree is most effectively determined by the same body that determines guilt or innocence.[22] As will be subsequently demonstrated,[23] a variety of factors entered into this legislative decision. In contrast, *Jackson* demonstrated no compelling legislative rationale for allowing only the jury to administer the death penalty.

In contrast to *Jackson*, the instant case is closely in point to *Spencer v. Texas*, 385 U.S. 554 (1967). Spencer challenged a habitual criminal statute whereby his past criminal conduct was put before the same jury that was trying the crime charged. Spencer's contention was that the use of his prior convictions to determine his status as a recidivist was so egregiously unfair as to offend the provisions of the Fourteenth Amendment Due Process clause. This Court rejected the contention for a variety of reasons. After pointing out that the laws of evidence, as developed by the states, have sought to evolve rules which

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[21] *Infra*, fn. 25-35 and accompanying text.

[22] *Infra*, fn. 46-51 and accompanying text.

[23] This determination has been made for other crimes. *Supra*, n. 17.

reconcile potential prejudicial effect with requirements of usefulness, the Court stated that the Due Process guarantees of fairness do not establish it as a legislative body for the promulgation of state rules of criminal procedure. In rejecting Spencer's contention that the habitual criminal issue should have been submitted to a second jury, this Court said:

> To say that a two-stage jury trial in the English-Connecticut style is probably the fairest, as some commentators and courts have suggested and with which we might well agree were the matter before us in a legislative or rule-making context, is a far cry from a constitutional determination that this method of handling the problem is compelled by the Fourteenth Amendment. Two-part jury trials are rare in our jurisprudence; they have never been compelled by this Court as a matter of constitutional law, or even as a matter of Federal procedure. 385 U.S. at 567-8. [Footnotes omitted.]

In *Spencer* this Court recognized the difference between potential benefit and constitutional requirement. This distinction is equally applicable to Crampton's contention that the Ohio unitary verdict procedure "chilled" his Fifth Amendment protection. The potential benefits of a bifurcated system are not sufficient to warrant, and do not require, a holding that the unitary system needlessly "chilled" Crampton's Fifth Amendment protection.

The Ohio practice of submitting the issue of guilt and punishment to a single jury is not, as Crampton finally contends, analogous to New York's former practice of simultaneously submitting to a jury the two issues of the voluntary nature of a confession and the guilt of the accused. This latter practice was, of course, struck down in *Jackson v. Denno,* 378 U.S. 368 (1963). The *Denno* rationale turned, in part, upon the fact that the accused

would be deterred from testifying on the voluntariness issue because of his vulnerability to broad cross-examination, including impeachment by proof of prior convictions. Nor would the appellate court be able to tell how the jury decided the question or whether the jury, upon finding coercion, actually disregarded the coerced confession. As has been previously emphasized, Crampton was not deterred from introducing evidence as to his character and motivation merely because he himself did not want to testify. Additionally, the unanswered questions that remain when a single verdict is rendered on the issues of voluntariness and guilt are not present when the sole issue is guilt and punishment.

3. The Ohio unitary jury system fully satisfied Crampton's constitutional right to a rational sentencing procedure.

This Court has recognized the need for the consideration of varied factors in the sentencing of a defendant. Indeed, the Due Process requirements of confrontation and cross-examination have often been subjugated to the overriding desire to get as much relevant information as possible in front of the sentencing body. In *Williams v. New York*, 337 U.S. 241 (1947), the defendant was sentenced after the trial court was made aware of investigations into his background by probationary authorities. This background consisted of crimes to which he had confessed but of which he had not been convicted and the conclusions that he possessed a "morbid sexuality" and was a "menace to society."[24] This Court upheld the use of these factors despite the denial to the defendant of all opportunity to confront or cross-examine those making

[24] 337 U.S. at 244.

the allegations or offer controverting evidence in his own behalf.

In *Williams* the Court dealt with the permissible scope of information that could be used in sentencing. Neither *Williams* nor subsequent cases dealing with this subject have established that, prior to sentencing, the sentencing body must extend its inquiry into all potentially relevant areas.

Indeed, subsequent cases have indicated that the more this process approximates an actual trial the less the chance of prejudice to the accused. Indicative of this approach is *Mempa v. Rhay*, 389 U.S. 128 (1967), which sought to introduce a form of due process protection into the sentencing procedure. The case dealt with a hearing at which the defendant's probation was revoked and sentence pronounced because of a subsequent crime he allegedly had committed. In addition, *Mempa* had the aggravating factor of judicial action based upon alleged but unproven acts. This Court held that Mempa's Sixth Amendment guarantees were abridged because he was denied counsel at the revocation hearing. The potential for aggravating factors in the sentencing process was felt to be reduced by the presence of counsel, cross-examination, an opportunity to be heard, and a record upon which an appeal would be based. Such protections are present in the unitary jury system in Ohio and other jurisdictions.

Clearly, Crampton had the right to have his sentence rationally determined. The rationality of the Ohio procedure is to be determined by *Mempa* and *Williams*. The sentencing body in Ohio is apprised of sufficient facts to determine intelligently the sentence, and yet the due process guarantees of the accused are fully protected. Under the principles enunciated in these cases the Ohio procedure is clearly rational.

This rationality in determining the sentence must be clearly differentiated from the question involved in *Skinner v. Oklahoma,* 316 U.S. 535 (1942). *Skinner* did not involve the sentence determining process but the rationality of the sentence itself. The defendant had been convicted under an Oklahoma statute which provided for the sterilization of habitual criminals. This sentence, as opposed to the method in which it was determined, was held to violate the equal protection requirements since the definition of "habitual criminal" drew an artificial line between intrinsically similar offenses (larceny and embezzlement). The *Skinner* case provides no support for Crampton's contention that his sentence was irrationally determined.[25]

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[25] This difference has been recognized by other Courts. As the Supreme Court of California stated in response to a similar claim in *In re Anderson,* 69 Cal. 2d 613, 447 P.2d 117 (1968):

> The instant case differs from *Skinner v. Oklahoma,* 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655, cited by petitioners. *Skinner* held that a statutory classification requiring sterilization under specified circumstances of persons convicted of larceny but not those convicted of embezzlement was a violation of equal protection. The court stated in part (at p. 541, 62 S.Ct. at p. 1113) "When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment." Penal Code, sections 190 and 190.1, however, do not contain an unconstitutional classification, and, since under like circumstances every person convicted of first degree murder has the same chance for leniency as well as the same possibility of receiving the maximum sentence, there is nothing discriminatory in the sections. 447 P.2d at 127-8.

4. Crampton's use of means other than personal allocution permitted him to exercise freely his Fifth Amendment protection.

Under Ohio procedure the jury may obtain a sufficient basis for a rationally-determined sentence without the personal testimony of the defendant. First, it must be emphasized that even if Crampton had introduced evidence bearing only on the question of guilt, much of that evidence would also be relevant to the issue of punishment. Evidence relating to the circumstances of the crime, intent and motive, and the sanity of the accused, comes within this category. Second, any lingering doubts in the jurors' minds as to the defendant's guilt, even though not sufficient to result in acquittal, may be relevant to their determination of whether to recommend mercy. Third, non-evidentiary factors not dependent upon the identity of a given defendant may be relevant to a rationale determination of sentence. Despite instructions limiting the jury to the evidence introduced at trial, policy considerations, such as favor or disfavor of capital punishment, may be supplied by the jurors themselves.[26] Last, of course, is the fact that defendant may introduce evidence relevant to the punishment issue by means other than his taking the stand.[27]

This is especially true where the insanity defense has been raised. In practice, much evidence otherwise relevant only to the issue of punishment, and thus not necessarily admissible, becomes relevant to the issue of insanity, and must be admitted.

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[26] See *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

[27] See the opinion below, 18 Ohio St. 2d at 186, 248 N.E.2d at 617; *Segura v. Colorado*, 431 P.2d 768, 769-70 (Colo. 1967). See generally *Johnson v. Commonwealth*, 208 Va. 481, 158 S.E.2d 725, 730-31 (1968).

> [I]n many capital cases the 'insanity' issue is raised and the accused reaps much of the benefit of developing background information in mitigation without the burden of being exposed to evidence in aggravation. *Frady v. United States*, 348 F.2d 84, at 115 (D.C. Cir.) (dissenting opinion of Burger, J.), *cert. den.*, 382 U.S. 909 (1965).

Crampton claims that under *Ashbrook v. State*, 49 Ohio App. 298, 197 N.E. 214 (1935) no evidence relevant solely to the punishment issue may be introduced. A careful reading of *Ashbrook* reveals that it stands only for the proposition that a trial court *need* not admit such evidence. In *Ashbrook* the court stated:

> The court did permit a great deal of evidence indicating the character of the surroundings of the [defendant] during his previous life, that he was placed in orphan homes, that he was repeatedly in contact with the Juvenile Court, and was an inmate of correctional institutions. Insanity, either at the time of the homicide or trial, was never suggested. 49 Ohio App. at 301.

What the *Ashbrook* case appears to hold, simply, is that the trial judge has considerable discretion in limiting the latitude allowed to the defendant in the presentation of background evidence.[28] Moreover, even if Crampton's interpretation were correct, a defendant is not prejudiced thereby since the limitation would apply equally to the prosecution.

Petitioner further claims that under *Ashbrook* evidence as to a defendant's insanity necessitates a jury instruction that such evidence may be considered only

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[28] This argument, that *Ashbrook* merely gives discretion to the trial judge, is also put forward by petitioner's *amici curiae*, *Brief of Amici Curiae*, pp. 73-74.

with regard to the guilt issue.[29] However, the *Ashbrook* court explicitly stated that no insanity issue had been raised.[30] In any event, no such limiting instruction was given in the instant case. The court stated on voir dire:

> [T]he matter of mercy is solely within the discretion of the jury and requires the exercise of its most prudent judgment. *The issue of mercy must be resolved in the light of all of the facts and circumstances in the case* and it is their sole responsibility and sole duty to determine whether or not mercy should be given. [Emphasis added.] Vol. I of the Record, p. VD-14.

5. Crampton's voluntary tactical decision to introduce substantial mitigating evidence on his alleged insanity removed any need for personal testimony.

An examination of the evidence introduced by Crampton reveals that there was little need for him to add personal testimony in mitigation. He was able to establish a virtually complete biography, as well as to introduce summaries of his personality and background by two doctors, two psychologists, two psychiatrists and a social worker (A. 5-31, 49-59). Although the jury determined this was not sufficient to establish legal insanity, such data could be considered relevant to the punishment question. Also pertinent would be any doubts as to guilt induced by Crampton's evidence that the killing was accidental and thus not first-degree murder (A. 8, 11, 15, 16-17, 55). Moreover, it appears that the subject of petitioner's drug addiction, far from being introduced "of necessity,"[31] was the central theme of his defense. Par-

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[29] Petitioner's Brief, p. 11.

[30] 49 Ohio App. at 301.

[31] Petitioner's Brief, p. 16.

ticularly in light of the fact that portions of his medical records were prejudicial to his claims of innocence and insanity—they included six statements that defendant "shot and killed his wife" (A. 21, 23, 29, 30) and unanimity of opinion that he was sane [32]—it is arguably possible that one of Crampton's purposes in introducing them was to call the jury's attention to the above-mentioned mitigating factors. In any case, it appears impossible to describe the jury as "ignorant of his character and background, and totally unaware of any mitigating facts surrounding the commission of the alleged crime." [33]

Having introduced such evidence on his own initiative, Crampton is in a poor position to claim that he was deterred from testifying by fear of cross-examination by the prosecution. The need for personal testimony on his part was not great enough to have meaningfully discouraged exercise of his right not to testify. His ability personally to present mitigating evidence on the question of punishment was not hindered by the specter of cross-examination.

It should be noted that Crampton's introduction of evidence of his background which was at once mitigating and prejudicial was, contrary to his claims,[34] a voluntary tactical decision. The Ohio rule that a defendant claiming insanity must show his insanity at the time of the crime

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[32] "The test findings fail to show any marked psychotic process nor, for that matter, any residuals of his recent amphetamine intoxication." A.18. "He should be considered legally responsible for his actions." A.25. "This patient has a prolonged criminal record and never was found to be insane. . . . The psychological evaluation does not reveal any psychosis or brain damage." A.30. "The patient is sane. . . . He is in good contact with reality and able to differentiate between right and wrong." A.31. The most common diagnosis of petitioner was "Sociopathic Personality Disturbance."

[33] Petitioner's Brief, p. 11.

[34] Petitioner's Brief, pp. 15-16.

by a preponderance of the evidence[35] does not require that he use "medical" evidence, evidence of his mental condition prior to the crime, written records, or all evidence available to him. He may fulfill his burden by use of any evidence relevant, including oral expert opinion and testimony of relatives or acquaintances, as attempted here. Crampton's counsel decided to prove Crampton's insanity through potentially prejudicial evidence. In adopting such an approach, he relied upon the settled Ohio procedure, clearly permissible under the holding of *Spencer v. Texas*, 385 U.S. 544 (1967), for the establishment of the insanity defense. Having failed in that attempt, he now asserts that his own choice of tactics somehow constitutes a denial of Crampton's constitutional rights.

In any event, review has not been here granted on the question of whether Ohio's requirement that a claim of insanity be treated as an affirmative defense violates defendant's right to be free from self-incrimination.

6. The Ohio clemency procedure for the granting of pardons and reprieves permits Crampton to present and give effect to substantial mitigating factors.

This Court should not decide Crampton's contentions on the assumption that all relevant events occur prior to sentencing. The Ohio criminal statutes have established detailed steps which can be followed by a defendant seeking to mitigate his sentence. Before sentence is pronounced the defendant must be informed by the court of the verdict of the jury and be asked whether he has anything to say as to why judgment should not be pronounced against him.[36] Additionally, the trial court is instructed to

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[35] *State v. Austin*, 71 Ohio St. 317, 73 N.E. 218 (1905).

[36] Ohio Rev. Code § 2947.05 (Page's 1954).

hear testimony in mitigation of the sentence.[37] Finally, an appellate court is empowered to remand the accused for the sole purpose of correcting a sentence which has been imposed contrary to law.[38]

It is not contended that these statutes authorize either a trial or an appellate court to override the verdict of death imposed by a jury in a capital case, unless that verdict is contrary to law. These statutes are important, nevertheless, in that they enable the accused to supplement the evidence introduced at the trial by placing personal statements and other mitigating factors before the trial judge. Such evidence will then be available for subsequent determination of whether a reprieve should be recommended.

Ohio determines the issue of reprieve in a two-stage process. An initial determination is made by the Adult Parole Authority. A recommendation is then made by this Authority to the governor. The ultimate determination rests, then, with the governor.[39] In making its recom-

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[37] Ohio Rev. Code § 2947.06 (Page's 1954).

[38] Ohio Rev. Code § 2953.07 (Page's 1954).

[39] The statute provides, in relevant portion:

> The authority may recommend to the governor that pardon, commutation, or reprieve of sentence of any convict or prisoner, or grant a parole to any prisoner, if in its judgment there is reasonable ground to believe that, if the convict is granted a pardon, commutation, or reprieve, or the prisoner is paroled, such action would further the interests of justice and be consistent with the welfare and security of society. The trial judge and prosecuting attorney of a trial court in which a person was convicted shall furnish, at the request of the authority, a summarized statement of the facts proved at the trial, and of all other facts having reference to the propriety of recommending a pardon or commutation, or granting a parole, together with a recommendation for or against the pardon, commutation, or parole, and the reasons for such recommendation. Ohio Rev. Code § 2967.03 (Page's Supp. 1970).

mendation the Authority is vested with wide investigative powers.[40]

Two factors are apparent from the statutory scheme established by the Ohio Legislature. First, the statements made by a defendant to the trial judge may influence the judge's recommendations to the Adult Parole Authority. Certainly, in a capital case, a trial judge, confronted with a mitigating statement by the defendant, at the time of sentencing, would seek to have the accused's death sentence reprieved.[41] Second, the investigation by the Authority itself is carefully designed, as the requirements of the statute indicate, to reveal all factors relevant to a reprieve.

It cannot be said that, by establishing a single jury system, the Ohio legislature has sought to send a convicted murderer to his death without permitting him to introduce all factors relevant to punishment. The creation of the Parole Authority, with its broad investigative powers, was in part designed to ascertain and give effect to any factors which Crampton may have desired to present personally to the jury. It is reasonable to assume that, if any mitigating factors are present the Authority, the trial judge, the prosecutor and governor will see to it

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[40] The statute provides that:

> Upon the filing of such application [for reprieve] or when directed by the governor in any case, a thorough investigation into the propriety of granting a pardon, commutation, or reprieve shall be made by the authority, which shall report in writing to the governor a brief statement of the facts in the case, together with the recommendations of the authority for or against the granting of a pardon, commutation, or reprieve, the grounds thereof and the records or minutes relating to the case. Ohio Rev. Code § 2967.07 (Page's Supp. 1970).

[41] A discussion of the possibility of recommendations by both the trial judge and prosecutor is found in Note, *Executive Clemency*, 39 N.Y.U.L.Rev. 136 (1964).

that they are brought forward in determining whether a reprieve should be granted.[42]

7. The Constitutional mandate of due process does not require a bifurcated jury trial.

In *Spencer v. Texas*, 385 U.S. 554 (1967) this Court held that the fact a practice may, upon analysis by this Court, seem wiser or fairer is not in itself sufficient to warrant overriding complex state procedural rules. As was stated by Justice Cardozo in *Snyder v. Massachusetts*, 291 U.S. 97 (1933):

> The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. Its procedure does not run foul to the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a sure promise of protection to the prisoner at bar. [Citation omitted.] 291 U.S. at 105.

In analyzing the dual jury structure it is imperative that this Court go beyond fairness and that the problems in such a system also be considered. Several courts have examined the problems inherent in the imposition of a constitutional requirement of dual juries upon the several states.[43] The reasons, as stated by these courts, make it

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[42] For an informative discussion of the burden and responsibility faced by the governor, see DiSalle, *Comments on Capital Punishment and Clemency*, 25 Ohio St. L.J. 71 (1964).

[43] *Maxwell v. Bishop*, 398 F.2d 138 (8th Cir. 1968), *vacated on other grounds*, 398 U.S. 262 (1970); *United States v. Curry*, 358 F.2d 904 (2d Cir.), *cert. den.*, 385 U.S. 873 (1966); *Frady v. United States*, 348 F.2d 84, 111 (D.C. Cir.) (dissenting opinion per Burger, J.), *cert den.*, 382 U.S. 909 (1965).

readily apparent that the dual jury issue is a complex problem which can only be satisfactorily resolved by legislative action.

The dual jury structure is found in only six states.[44] This may be because of the burdensome increase in time and expense inherent in such a system. In addition, however, there are potential problems in the dual jury structure which may work to the detriment of the defendant. Under present procedural systems the defendant is able to introduce substantial mitigating evidence without subjecting himself to impeachment by state authorities. This is exactly what occurred at Crampton's trial. If the dual jury system were adopted, the defendant, after testifying in mitigation of his own sentence, would be subject to a full array of impeaching and aggravating evidence offered by the state. The experience in California indicates that in trials held specifically on the issue of punishment, prosecutors take full advantage of all opportunities open to them, whereas the defendants' attorneys are unsophisticated about what factors should be advanced and fail to exploit possible advantages.[45]

The practical problems involved in any decision requiring dual juries cannot be overemphasized. Initially, any such procedure would be expensive, time consuming, and very troublesome to the state judicial system. Additional problems would be raised regarding who had the burden of proof as to specific issues at the second trial, what evidentiary rules should be applied at the second trial, and whether and to what extent the results of the second trial could be reviewed by appellate courts.

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[44] California, Connecticut, Georgia, New York, Pennsylvania and Texas. See note 52 *infra*.

[45] Note, *Executive Clemency*, 39 N.Y.U.L.Rev. 136, 167 (1964); *United States v. Curry*, 358 F.2d 904 (2d Cir.), *cert. den.*, 385 U.S. 873 (1966).

It is apparent that many complex questions are involved in an analysis of dual juries. Not the least, of course, is the fundamental question as to which approach best protects the defendant. It would be quixotic indeed for this Court, in its efforts to be fairer to defendants accused of capital crimes, to render a decision which resulted in a greater number of death sentences.

II. THE OHIO LEGISLATIVE DETERMINATION TO PLACE THE RECOMMENDATION OF MERCY IN CAPITAL CASES IN THE UNFETTERED DISCRETION OF THE JURY GUARANTEED CRAMPTON DUE PROCESS AND EQUAL PROTECTION.

The settled practice in Ohio for over fifty years has been to permit juries in capital cases to exercise their discretion, without any enumerated standards, in determining under what circumstances they will recommend mercy. Ohio Rev. Code § 2901.01 (Page's 1954) provides in pertinent part:

> Whoever violates this section is guilty of murder in the first degree and shall be punished by death unless the jury trying the accused recommends mercy, in which case the punishment shall be imprisonment for life.

The development of Ohio's law interpreting this statute reveals a careful analysis of the conflicting considerations relevant to a capital case. In *Howell v. State*, 102 Ohio St. 411, 422-23, 131 N.E. 706 (1921) the Supreme Court of Ohio interpreted this statute to mean that the jury had an absolute discretion to recommend mercy. The court stated that this discretion should not be influenced by the trial court, but should be exercised only in view of all the facts and circumstances disclosed by the evidence. Thus, in Ohio the jury's discretion is "unlimited" in the

sense that the choice of punishment is wholly within its province rather than the judge's, and the trial judge therefore may not influence its decision by setting standards for its exercise of discretion.[46] On the other hand, the jury's discretion is limited in that the jury must make its determination of punishment in view of the facts as disclosed by the evidence before it.[47] For example, in *State v. Caldwell*, 135 Ohio St. 424, 427-28, 21 N.E.2d 343 (1939) the Supreme Court of Ohio upheld the trial court's refusal to accede to the defendant's request to instruct the jury to consider environmental and sociological factors in reaching its decision as to the punishment.

The trial judge may instruct the jury on the effect of a recommendation of mercy, including the possibility of eventual parole of the defendant,[48] although it is not prejudicial error if he does not so instruct them.[49] But beyond this point the trial court may not step without invading the jury's province.[50] Where the jury does not

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[46] *State v. Tudor*, 154 Ohio St. 249, 259-60, 95 N.E.2d 385 (1950); *Liska v. State*, 115 Ohio St. 283, 285, 152 N.E. 667 (1926); *State v. Ellis*, 98 Ohio St. 21, 32, 120 N.E. 218 (1918); *Ashbrook v. State*, 49 Ohio App. 298, 301, 197 N.E. 214 (1935); *Shelton v. State*, 12 Ohio App. 376, 380 (1919), *rev'd on other grounds*, 102 Ohio St. 376, 131 N.E. 704 (1921); *Prymas v. State*, 3 Ohio L. Abs. 446 (Ct. App. 1925).

[47] *State v. Tudor*, 154 Ohio St. 249, 259, 95 N.E.2d 385 (1950); *Howell v. State*, 102 Ohio St. 431, 435, 131 N.E. 712 (1921); *Shelton v. State*, 102 Ohio St. 376, 380, 131 N.E. 704 (1921).

[48] *State v. Henley*, 15 Ohio St.2d 86, 238 N.E.2d 773, *cert. den.*, 393 U.S. 1006 (1968).

[49] *State v. Karayians*, 108 Ohio St. 505, 141 N.E. 334 (1923).

[50] *State v. Ellis*, 98 Ohio St. 21, 28, 120 N.E. 218 (1918). It is worthy of note that, if a defendant elects to waive a jury trial pursuant to Ohio Rev. Code Section 2945.05 (Page's 1954), or pleads guilty to a capital offense, Ohio Rev. Code Section 2945.06 (Page's 1954) provides for a three-judge court to determine the question of punishment, with the power to "reduce the punish-

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recommend mercy, a death penalty is necessarily imposed by the trial court.[51]

The practice of not restricting a jury's discretion with standards is almost of universal application.[52] What-

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ment for such offense to life imprisonment, in like manner as upon recommendation of mercy by a jury." It has been held that in such circumstances the three-judge court exercises the same discretion as would a jury. *State v. Frohner*, 150 Ohio St. 53, 100, 80 N.E.2d 868 (1948); *State v. Lucear*, 93 Ohio App. 281, 109 N.E.2d 39 (1952); *In Re Knight*, 73 Ohio App. 547, 57 N.E.2d 273 (1944). Thus, even where a defendant waives a jury trial or pleads guilty, Ohio refuses to allow one man—a trial judge—to determine the question of life or death, or to set standards for such determination.

[51] *State v. Ellis*, 98 Ohio St. 21, 28, 120 N.E. 218 (1918).

[52] Forty-one states plus the District of Columbia follow such a procedure. See Ala. Code tit. 14, § 318 (1959); Ariz. Rev. Stat. § 13-453 (1956); Ark. Stat. Ann. §§ 41-2227, 43-2153 (1964); Cal. Pen. Code § 190.1 (Deering's 1955); Colo. Rev. Stat. ch. 40, art. 2-3 (1964); Conn. Gen. Stat. Ann. § 53-10 (Supp. 1970); Del. Code Ann. tit. 11, § 3901 (Supp. 1969); Dist. of Col. Code § 22-2404 (1967); Fla. Stat. Ann. §§ 782.04, 919.23 (1944); Ga. Code Ann. § 26-3102 (Supp. 1969); Idaho Code § 18-4004 (1948); Ill. Rev. Stat. ch. 38, §§ 9-1, 1-7(c)(1) (1964); Ind. Stat. Ann. §§ 10-3401, 9-1819 (Burns' 1956); Kan. Stat. Ann. § 21-403 (1964); Ky. Rev. Stat. § 435.010, Rules Crim. Proc. § 9.84 (1969); La. Rev. Stat. tit. 14, § 30, Code of Crim. Proc. art. 817 (1967); Md. Ann. Stat. art. 27, § 413 (1967); Mass. Laws Ann. ch. 265, § 2 (1968); Miss. Code Ann. § 2217 (1957); Mo. Stat. Ann. § 559.030 (Vernon's 1953); Mont. Rev. Code Ann. § 94-2505 (1969); Neb. Rev. Stat. § 28-401 (1965); Nev. Rev. Stat. § 200.030 (1969); N.H. Rev. Stat. Ann. § 585.4 (1955); N.J. Stat. Ann. tit. 2A, ch. 113, § 4 (1969); N.M. Stat. Ann. ch. 40A, 29-2.1 (Supp. 1969); N.Y. Penal Code §§ 125.30, 125.35 (1967); N.C. Gen. Stat. § 14-17 (1969); N.D. Century Code § 12-27-13 (1960); Ohio Rev. Code § 2901.01 (Page's 1964); Okla. Stat. Ann. tit. 21, § 707 (1958); Pa. Stat. Ann. tit. 18, § 4701 (Purdon's 1963); S.C. Code of Laws § 16-52 (1962); S.D. Compiled Laws § 22-16-13 (1967); Tenn. Code Ann. §§ 39-2405, 39-2406 (1955); Tex. Pen. Code art. 1247 (1961); Utah Code Ann. § 76-30-4 (1953); Vt. Stat. Ann. tit. 13, § 2303 (Supp. 1970); Va. Code §§ 18-1-22, 19.1-250 (1960); Wash. Rev. Code § 9.48.030 (1961); Wyo. Stat. § 6.54 (1959).

Rhode Island has abolished the death penalty in all cases except murder in the first degree committed by a person already

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ever other variations exist between the practices of the several states, forty-one of the forty-two jurisdictions which have not abolished the death penalty (including the District of Columbia) leave the issue of punishment to the discretion of the jury.[53] Not only has this practice been recognized by this Court as the "settled policy of many states,"[54] but also it is the federal practice under 18 U.S.C. § 1111 (1964). This practice was specifically approved by this Court under the predecessors of Section 1111 in *Andres v. United States*, 333 U.S. 740, 744 (1948), and *Winston v. United States*, 172 U.S. 303 (1899).

Most of these states have considered the question of establishing standards and have concluded that their respective legislatures left the decision regarding punishment to the "exclusive" or "inviolate" province of the jury.[55] It has frequently been held that the trial court

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under a sentence of life imprisonment, in which case the mandatory penalty upon conviction is death by hanging. R. I. Gen. Laws § 11-23-2 (1970). The remaining nine states have totally abolished the death penalty: Alas. Stat. § 11.15.010 (1962); Haw. Rev. Stat. § 748-4 (1968); Iowa Code Ann. § 690.2 (Supp. 1970); Maine Rev. Stat. Ann. tit. 17, § 2651 (1965); Mich. Stat. Ann. § 28.548 (1954); Minn. Stat. Ann. § 609.185 (1964); Ore. Rev. Stat. § 163.010 (1969); W. Va. Code § 61-2-2 (1966); Wis. Stat. Ann. § 940.01 (1958).

[53] See the authorities collected in note 52, *supra*.

[54] *Giaccio v. Pennsylvania*, 382 U.S. 399, 405 n. 8 (1966).

[55] *Coleman v. United States*, 357 F.2d 563 (D.C. Cir. 1965); *Hinton v. State*, 280 Ala. 48, 53, 189 So.2d 849 (1966); *Hernandez v. State*, 43 Ariz. 424, 32 P.2d 18, (1934); *Smith v. State*, 205 Ark. 1075, 172 S.W.2d 249 (1943); *People v. Purvis*, 52 Cal. 2d 871, 346 P.2d 22 (1959); *Sukle v. People*, 107 Colo. 269, 111 P.2d 233 (1941); *State v. Donahue*, 141 Conn. 656, 109 A.2d 364 (1954), *appeal dismissed and cert. den.*, 349 U.S. 964 (1955); *Poole v. State*, 194 So.2d 903 (Fla. 1967); *Bangus v. State*, 141 So.2d 264, 266 (Fla. 1962); *Wyatt v. State*, 220 Ga. 867, 142 S.E.2d 810 (1965); *State v. Clokey*, 83 Idaho 322, 364 P.2d 159 (1961); *People v. Dukes*, 12 Ill.2d 334, 339, 146 N.E.2d 14

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should not establish standards to guide the jury.[56] It has also been held that the trial judge should merely inform the jury of the existence of its discretion,[57] or merely

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(1958); *Blue v. State*, 224 Ind. 394, 67 N.E.2d 377 (1946); *State v. Wilson*, 151 Iowa 698, 141 N.W. 337 (1913); *State v. Christensen*, 166 Kan. 152, 199 P.2d 475 (1948); *King v. Commonwealth*, 228 Ky. 842, 16 S.W.2d 476 (1929); *State v. Henry*, 197 La. 999, 3 So.2d 104 (1941); *Dickerson v. State*, 202 Miss. 804, 32 So.2d 881 (1947); *Duisen v. State*, 441 S.W.2d 688, 692 (Mo. 1969); *State v. Palen*, 120 Mont. 434, 186 P.2d 223 (1947); *State v. Leakey*, 44 Mont. 354, 120 P. 234 (1911); *Iron Bear v. Jones*, 149 Neb. 651, 32 N.W.2d 125 (1948); *Kramer v. State*, 60 Nev. 262, 108 P.2d 304 (1940); *State v. Martin*, 92 N.J.L. 436, 106 Atl. 385 (1919); *State v. Crawford*, 260 N.C. 548, 133 S.E.2d 232 (1963); *Howell v. State*, 102 Ohio St. 411, 131 N.E. 706 (1921); *Bradley v. State*, 31 Okla. Crim. 194, 237 P. 625 (1925); *Commonwealth v. Woodling*, 355 Pa. 555, 50 A.2d 328 (1947); *State v. Chasteen*, 228 S.C. 88, 88 S.E.2d 880 (1955); *Gohlston v. State*, 143 Tenn. 126, 223 S.W. 839 (1919); *Calderon v. State*, 63 Tex. Crim. 639, 141 S.W. 251 (1911); *State v. Thorne*, 39 Utah 208, 117 P. 58 (1911); *State v. Bosworth*, 86 Vt. 71, 83 A. 657 (1912); *Johnson v. Commonwealth*, 208 Va. 481, 158 S.E.2d 625 (1968); *White v. Rhay*, 64 Wash.2d 15, 390 P.2d 535 (1964); *Pixley v. State*, 406 P.2d 662 (Wyo. 1965); *but see White v. State*, 227 Md. 615, 177 A.2d 877 (1962) (held that trial court alone has discretion concerning whether the death sentence should be imposed, although jury could recommend mercy and its recommendation would be binding on trial court).

[56] *In re Anderson*, 69 Cal. 2d 613, 447 P.2d 117 (1968); *State v. Martin*, 92 N.J.L. 436, 106 A. 385 (1919); *Duisen v. State*, 441 S.W.2d 688 (Mo. 1969); *State v. Bosworth*, 86 Vt. 71, 83 A. 657 (1912); but see *Commonwealth v. Foster*, 364 Pa. 288, 72 A.2d 279 (1950) (not error for trial judge to charge jury regarding facts which he thinks bear on issue of punishment so long as he emphasizes that the jury has exclusive discretion and is not bound by the court's opinion); *Woodruff v. State*, 164 Tenn. 530, 51 S.W.2d 843 (1932) (not error to charge jury that they must find mitigating circumstances to recommend mercy, in view of clause in Tennessee statute to effect that jury could recommend mercy if in its opinion there were mitigating circumstances).

[57] *State v. Donahue*, 141 Conn. 656, 109 A.2d 364 (1954), *appeal dismissed and cert. den.*, 349 U.S. 926 (1955); *Wyatt v. State*, 220 Ga. 867, 142 S.E.2d 810 (1965); *Blair v. Commonwealth*, 70 Ky. 227 (1870); *Walton v. State*, 57 Miss. 533 (1879); *Holmes v. State*, 6 Okla. Crim. 541, 119 P. 430 (1911); *State v. Jones*, 201 S.C. 403, 23 S.E.2d 387 (1942).

read to the jury the statute fixing the punishment.[58] In addition, in most of these jurisdictions the jury's determination is binding on the trial judge.[59]

While almost all forty-one jurisdictions consign the issue of punishment determination to the jury without

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[58] *Hernandez v. State*, 43 Ariz. 424, 32 P.2d 18 (1934); *State v. Winsett*, 205 A.2d 510 (Del. Super. 1964); *Garner v. State*, 28 Fla. 113, 9 So. 835 (1891); *State v. Dong Sing*, 35 Idaho 616, 208 P. 860 (1922); *State v. Thorp*, 86 N.H. 501, 171 A. 633 (1934).

[59] The statutes committing the issue of punishment to the jury's discretion are of three distinct types: 1) those authorizing the jury to provide for either the death penalty or life imprisonment; 2) those providing for mandatory death penalty unless the jury recommends mercy; and 3) those providing for mandatory life imprisonment unless the jury recommends capital punishment. Of the 41 statutes listed in footnote 3, 19 fall in the first category (Alabama, Arizona, California, Colorado, Idaho, Indiana, Kansas, Kentucky, Maryland, Missouri, Montana, Nebraska, New York, North Dakota, Pennsylvania, Tennessee, Texas, Vermont and Virginia), 17 are in the second group (Arkansas, Connecticut, Delaware, District of Columbia, Florida, Louisiana, Massachusetts, Mississippi, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, South Carolina, Utah and Wyoming), and 5 comprise the third group (Georgia, Illinois, New Hampshire, South Dakota and Washington).

Of those nineteen states in the first category (the "either/or" statutes), eighteen bind the trial court by the jury's decision, the lone exception being Maryland, which binds the trial court by a jury's decision of life imprisonment but not a jury's decision to impose the death penalty. *White v. State*, 227 Md. 615, 177 A.2d 877 (1962). Indeed, Maryland could be considered a "second category" state but for the fact that the jury cannot impose a binding death penalty.

Of the seventeen jurisdictions comprising the second category (the "death unless mercy" statutes), fifteen provide by case or statute that the jury's decision to extend mercy binds the trial court. The two exceptions are Delaware and Utah, both of which provide by statute that upon a recommendation of mercy by the jury the court can then impose life imprisonment "if it seems proper to do so" (Del. Code Ann. tit. 11, § 3901) or "in its discretion" (Utah Code Ann. § 76-30-4; *State v. Markham*, 100 Utah 226, 112 P.2d 496 (1941)).

Two of the five jurisdictions in the third category (the "life unless death" statutes)—New Hampshire and Washington—bind the trial court by a jury's recommendation of death, while Georgia, Illinois and South Dakota provide that such a recommendation is not binding on the trial court.

standards to guide its discretion, there is a split of authority concerning whether the judge should instruct the jury that it must limit its discretion in determining the punishment to the evidence introduced at trial. Cases in twelve jurisdictions hold that determination of punishment should be based upon such evidence,[60] while five states have established the rule that the jury is not limited to the evidence introduced at trial in granting mercy.[61]

The specific details of the standards issue vary widely from jurisdiction to jurisdiction. There is, however, a widespread general practice of leaving to the jury the issue of punishment in a capital case with no standards to restrict its discretion.

1. The decision not to impose standards on the jury's discretion is a valid exercise of legislative power.

In arguing for the unconstitutionality of the present "standardless" Ohio practice, petitioner overlooks the almost countless cases, both federal and state, which have considered the precise issue he raises and have resolved the issue in favor of the constitutionality of the practice

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[60] E.g. *Sukle v. People*, 107 Colo. 269, 111 P.2d 233 (1941); *State v. Donahue*, 141 Conn. 656, 109 A.2d 364 (1954), *appeal dismissed and cert. den.*, 349 U.S. 926 (1955); *State v. Galvano*, 4 W.W. Harr. (36 Del.) 409, 154 Atl. 461 (Del. O. & T. 1930); *Commonwealth v. McNeil*, 328 Mass. 436, 104 N.E.2d 153 (1952); *State v. Tiedt*, 360 Mo. 594, 229 S.W.2d 582 (1950); *State v. Jefferson*, 131 N.J.L. 70, 34 A.2d 881 (1943); *People v. Ertel*, 283 N.Y. 519, 29 N.E.2d 70 (1940); *Howell v. State*, 102 Ohio St. 411, 131 N.E. 706 (1921); *State v. Kelley*, 118 Ore. 397, 247 P. 146 (1926); *Commonwealth v. Childers*, 346 Pa. 258, 27 A.2d 35 (1943); *Woodruff v. State*, 164 Tenn. 530, 51 S.W.2d 843 (1932); *State v. Brown*, 60 Wyo. 379, 151 P.2d 950 (1944).

[61] E.g. *Wyatt v. State*, 220 Ga. 857, 142 S.E.2d 810 (1965); *State v. Henry*, 196 La. 217, 198 So. 910 (1940); *State v. McMillan*, 233 N.C. 630, 65 S.E.2d 212 (1951); *State v. Jones*, 201 S.C. 403, 23 S.E.2d 387 (1943); *State v. Markham*, 100 Utah 226, 112 P.2d 496 (1941).

he attacks.[62] He is forced instead to rely upon the dissent in *In re Anderson*, 69 Cal. 2d 613, 447 P.2d 117, 132 (1968). Such unanimity from the widespread collection of jurists who have examined the same issue over a period of years is remarkable evidence of the soundness of the questioned practice. Although the reasons offered by the courts in defense of the "standardless" practice have been as varied as the assertions advanced by Crampton in this case, most of the reported opinions have indicated a judicial deference to legislative determination.

The federal courts which have considered the issue have consistently held that the absence of standards does not justify the conclusion that the practice constitutes a due process or equal protection violation.[63] This unanimity is reflected in the state court decisions as well.

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[62] State court decisions specifically upholding against constitutional attack a legislative determination to allow a jury to grant or deny mercy unfettered by imposed standards include *McCants v. State*, 282 Ala. 397, 211 So.2d 877 (1968); *State v. Walters*, 145 Conn. 60, 138 A.2d 786, *appeal dismissed and cert. den.*, 358 U.S. 46 (1958); *People ex rel. McKevitt v. District Court*, 447 P.2d 205 (Colo. 1968); *Wilson v. State*, 225 So.2d 321 (Fla. 1969); *Chatterton v. Dutton*, 223 Ga. 243, 154 S.E.2d 213, *cert. den.*, 389 U.S. 914 (1967); *State v. Latham*, 190 Kan. 411, 375 P.2d 783 (1962); *Irving v. State*, 228 So.2d 266 (Miss. 1969); *State v. Forcella*, 52 N.J. 263, 245 A.2d 181 (1968), *petition for writ of cert. dismissed*, 397 U.S. 959 (1970); *Johnson v. Commonwealth*, 208 Va. 481, 158 S.E.2d 725 (1968); *State v. Smith*, 74 Wash.2d 744, 446 P.2d 571 (1968); *People v. Fitzpatrick*, 61 N.Y.Misc.2d 1043, 308 N.Y.S.2d 18 (1970).

[63] See e.g., *Petition of Ernst*, 294 F.2d 556 (3rd Cir.), *cert. den.*, 368 U.S. 917 (1961). To the same effect are *Sims v. Eyman*, 405 F.2d 439 (9th Cir. 1969); *Maxwell v. Bishop*, 398 F.2d 138, 148-50 (8th Cir. 1968), *vacated on other grounds*, 398 U.S. 262 (1970); *State v. Culver*, 253 F.2d 507 (5th Cir.), *cert. den.*, 358 U.S. 822 (1958); and *Ex Parte Sullivan*, 83 F.2d 796 (9th Cir. 1936). In addition, although not specifically approving on constitutional grounds the practice of allowing full sway to the jury's discretion, this Court's decisions in *Winston v. United States*, 172 U.S. 303, 313 (1899) and *Andres v. United States*, 333 U.S. 740 (1948) plainly indicate that the federal practice, similar in almost all respects to Ohio's, has been upheld.

Among such decisions, one of the best judicial statements in point is found in *In re Anderson*, 69 Cal. 2d 613, 447 P.2d 117 (1968). After noting that the practice of giving the jury unfettered sentencing discretion in capital cases has long been established under the laws of many states, and the United States, the majority opinion reasoned that:

> The Legislature, by entrusting to the absolute discretion of the jury the decision between life imprisonment and death has indicated its belief that jurors understand the factors that are relevant to such a decision. . . . It may be neither practicable nor desirable that any rigid formula control a trier of fact in determining whether to extend mercy by imposing life imprisonment or to deny it by imposing death. . . . But even if it were practicable and desirable to have such a formula it does not follow that the Legislature's failure to provide one renders the sections unconstitutional. 447 P.2d at 125.[64]

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[64] See the cases collected in note 62 *supra*. See also *Duisen v. State*; 441 S.W.2d 688 (Mo. 1969), in which it is stated that:

> Many years ago the legislative branch declared the policy of this state to be that for the offense of first degree murder the punishment shall be either life imprisonment or death. That policy entrusts absolute discretion in a jury to make the decision whether the punishment assessed shall be one or the other, without standards or rules to guide the jury in making that decision. This policy has been in effect well over a century. Movant contends that this discretion should be limited, directed and controlled by uniform standards. We doubt the wisdom of prescribing standards in this area of criminal jurisprudence. Movant asserts that because standards (unarticulated by him) were not available to guide and direct the jury in making the decision in this case, its assessment of the death penalty violates his constitutional rights and that the law authorizing imposition of the alternative punishments is unconstitutional because violative of the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States.

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This wide gamut of cases indicates a frequent consideration and consistent rejection of the contention raised by petitioner. Petitioner's basic error lies in confusing *wisdom* and *constitutionality*, a distinction consistently emphasized by the above cases, and by this Court:

> The function of this federal Court under the Fourteenth Amendment in reference to state juries is not to prescribe procedures but is essentially to protect the integrity of the trial process by whatever method the state sees fit to employ. . . . But beyond requiring conformity to standards of fundamental fairness that have won legal recognition, this Court always has been careful not so to interpret this Amendment as to impose uniform procedures upon the several states whose legal systems stem from diverse sources of law and reflect different historical influences. *Fay v. New York*, 332 U.S. 261, 294 (1947).

2. Since the Ohio legislature can constitutionally provide a mandatory death penalty for murder in the first degree, it can constitutionally confer on a jury the right to dispense mercy in its sole discretion.

Petitioner's *amici curiae* argue that the "presumptive penalty" for murder in the first degree is not death, and therefore the grant of discretion to the jury cannot be viewed as a harmless dispensation. The plain fact, in Ohio and most other jurisdictions, is that as a matter of

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It does not follow that because the law entrusts this discretion to a jury without standards to direct and control its choice between the alternative punishments renders the law unconstitutional. We hold that the law is not unconstitutional and that movant's rights were not violated. The finding and judgment of the trial court clearly is not erroneous. 441 S.W.2d at 692.

historical and legislative development the death penalty is the presumptive—or original and primary—penalty for murder in the first degree, unless and to the extent that the legislature has permitted the jury to grant mercy. The historical development has been repeatedly recognized by the courts and commentators. In *Wilson v. State*, 225 So. 2d 321 (Fla. 1969), the Florida Supreme Court noted that the sole punishment for murder in Florida had traditionally been death, until the Legislature passed a separate statute giving juries the power to recommend mercy. Emphasizing this legislative history, the court rejected the petitioner's "standards" argument:

> The assault on Sec. 919.23(2), Fla. Stat., F.S.A., as failing to set up standards and guides to be followed by jurors in their consideration of the question of recommending mercy is also devoid of merit. Whatever criticism may be made of the absence of such standards, such would not embrace matters prejudicial to the defendant on trial, as each juror is free to vote for mercy for any reason at all. *Without this statute there would be only the death penalty prescribed unconditionally in Sec. 782.04, Fla. Stat., F.S.A.* (emphasis supplied) 225 So. 2d at 323-24.[65]

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[65] See *Maxwell v. Bishop*, 398 F.2d 138 (8th Cir. 1968), *vacated on other grounds*, 398 U.S. 262 (1970), in which the Eighth Circuit, in analyzing the Arkansas statute prohibiting rape, said:

> We point out initially, as to the first, that the basic punishment imposed by § 41-3403 is death. . . .
>
> The life imprisonment alternative came into the Arkansas statutes by Acts 1915, No. 187, § 1, p. 774. In operation it gave the Arkansas jury the power to alleviate punishment and extend clemency in cases (rape being just one of that category) where death had been the only punishment theretofore prescribed. The 1915 statute thus was in the direction of leniency and not away from it. 398 F.2d at 149.

To the same effect is Rubin, "The Law of Criminal Correction" at 325 (1963), quoted with approval in *Bell v. Patterson*, 279 F. Supp. 760 (D. Colo.), *aff'd*, 402 F.2d 394 (10th Cir. 1968):

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It must be noted that Ohio's statute, like Florida's, provides that the penalty for murder in the first degree is death *unless* the jury recommends mercy. In this respect, the Ohio statute is materially different from an "either/or" provision, which California has. Where the jury has the power to choose between two equally preferred penalties, as is the case in California, it can rationally be argued that death is no longer a presumptive penalty.[66] Where, however, the statute plainly states that the penalty is death unless the jury decides otherwise, it is plain that, as a matter of law, the primary penalty remains death. A grant of discretion to a jury to obviate the death penalty, despite being unlimited by standards, can only operate to the benefit of convicted defendants.

Stripped to its basic elements, petitioner's argument in this respect is simply one of numbers. Since more convicted murderers receive life imprisonment than the death penalty, he asserts that imposition of the death penalty is somehow unfair to those few remaining unfortunates who do not receive the jury's recommendation of mercy. Such increasing dispensation of mercy merely indicates the general trend away from the death penalty. This trend is, perhaps, the result of increasing sympathy

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In fact, it has been suggested by a noted authority on corrections that this is a mitigation of capital punishment:

'[T]hese statutes [allowing the jury a choice between the death penalty and a life term] are basically a mitigation of the capital penalty rather than a reflection of the orientation which gives general sentencing power to juries. The general criticism of jury sentencing is not applicable to this discretion of the jury. Like jurors in eighteenth century England, who frequently refused to convict in capital cases, we grasp at any means to lessen use of the death penalty.' 279 F. Supp. at 765.

[66] See, e.g., *People v. Green*, 47 Cal. 2d 209, 302 P.2d 307, 317 (1956).

and compassion on the part of individual jurors or perhaps the result of a disbelief in capital punishment. Nevertheless, despite the ever-changing totals of convicted capital defendants receiving the respective punishments, the historical and "presumptive" penalty remains *death*, not life imprisonment.

In the final analysis, the State of Ohio has provided the jury with the power to dispense with the mandatory death penalty if it decides it is appropriate to do so. The mere fact that in this particular case the jury did not believe Crampton was deserving of its compassion does not make the Legislature's system unconstitutional.

3. The discretion granted to the jury in determining punishment, not materially different than that granted to any other sentencing body, is no violation of Crampton's constitutional rights.

Petitioner's arguments concerning both the unconstitutionality and the inadvisability of the lack of standards to guide the jury's consideration overlook the fact that sentencing is necessarily an *ad hoc*, individualized process. It is true that no standards guide the jury's determination, except that it must be based upon the evidence in the case. However, it must be remembered that no standards guide the trial judge in imposing a sentence within specified minima and maxima in those jurisdictions where a trial judge has such authority, or in determining whether sentences on multiple offenses shall run concurrently or consecutively. No standards guide a trial judge in those jurisdictions and circumstances where he has the discretion to sentence a defendant as for a felony or a misdemeanor. No standards guide a governor in determining whether to pardon or commute the sentence of a particular individual convicted of crime, and, at least

in Ohio, no standards govern parole boards in determining when to set prisoners free and when to further detain them.

Several cases have emphasized this aspect of sentencing procedures. The Eighth Circuit, in *Maxwell v. Bishop*, 398 F.2d 138 (8th Cir. 1968), *vacated on other grounds*, 398 U.S. 262 (1970), stated that:

> We are not convinced that the absence of expressly stated standards in the statute requires that it be forthwith condemned constitutionally. Jurors are not automatons. They are human beings. The jury system appropriately assumes that jurors in their factual determinations bring into play their common sense and the experiences of life. Their choice between capital punishment and life imprisonment, as the entire Arkansas method of punishment imposition by the jury, is not startingly or shockingly different from the situation where choice of punishment within statutorily prescribed limits is for the judge. 398 F.2d at 149.

Similarly, the New Jersey Supreme Court, in *State v. Forcella*, 52 N.J. 263, 245 A.2d 181 (1968), *petition for writ of cert. dismissed*, 397 U.S. 959 (1970), rejected a contention that the state's murder statute denied due process because it did not contain any specific standard for the jury's determination of punishment. It, like Ohio, only required that the decision be made upon a consideration of all the evidence. The court reasoned as follows:

> Some subjects do not lend themselves to specific standards. There is no standard to guide the Legislature in deciding whether to exert the police power. There is no standard for an executive veto, or for executive clemency. So within the judicial branch there is no real standard for sundry matters which therefore are committed to nothing more explicit than a sound discretion. Although the Consti-

tution may require a standard whenever one is feasible and serviceable, it cannot follow the government must be denied all powers which defy a definitive statement of the basis for their exercise. 52 N.J. at 287, 245 A.2d at 193-94.[67]

Petitioner's *amici curiae* overlook the fact that, as a general proposition, all sentencing is necessarily *ad hoc* by asserting that the trial judge, "at least, is a professional sentencer," that he evolves a "feel" for how the cases "line up." Such an assertion, to begin with, overlooks the fact that sentencing by judges themselves has come under increasing criticism for arbitrariness, inequality and irregularity.[68]

It also overlooks the fact that in most instances the trial judge may properly utilize out-of-court information in reaching a decision concerning a sentence, even in a capital case.[69] Moreover, it overlooks the fact that there

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[67] See *Bell v. Patterson*, 279 F. Supp. 760 (D. Colo.), *aff'd*, 402 F.2d 394 (10th Cir. 1968):

> "Petitioner also argues that jury sentencing violates due process because it is carried out without proper standards and cannot be supervised or reviewed. However, this is not a constitutional requirement. If standards and review were required, *judicial* sentencing as it now exists would also be unconstitutional." 279 F. Supp. at 766 (emphasis in original).

See also *Smith v. Rhay*, 254 F.2d 306 (9th Cir. 1958), in which the Ninth Circuit upheld against a Due Process attack a Washington statute which permitted the trial judge to sentence one convicted of manslaughter either as for a felony or as for a gross misdemeanor: "Nor does such a statute deny equal protection of the law because it provides for a wide range between the minimum and the maximum sentence which may be imposed for the same crime." 254 F.2d at 308, quoting from *Daloia v. Rhay*, 252 F.2d 768, 770 (9th Cir. 1958).

[68] See, e.g., Rubin, "Disparity and Equality of Sentences—A Constitutional Challenge," 40 F.R.D. 55 (1966); Mapes, "A Growing Disparity In Criminal Sentences Troubles Legal Experts," The Wall Street Journal, September 8, 1970, page 1, col. 1.

[69] *Williams v. New York*, 337 U.S. 241, 246, 251 (1949).

are valid legislative purposes behind the granting of such discretion to the jury rather than the judge. One such purpose is a reluctance to have a life-or-death decision hinge on the opinion of one man, no matter how skilled or experienced he may be.[70]

Perhaps the most important purpose is the realization that the jury, rather than the judge, constitutes an expression and distillation of the community's views and values, and should be the body to determine the issue of life or death. Although, concededly, a twelve-man jury is a less reliable expression of community mores than a plebiscite, the fact remains that it is at least arguably more representative in this regard than is the view—however learned—of one man. A state legislature has valid grounds for entrusting this determination to the jury.

This Court recognized the function of the jury as the conscience of the community on this question in *Witherspoon*, where it stated:

> Guided by neither rule nor standard, 'free to select or reject as it [sees] fit,' a jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death. 391 U.S. at 519.

Although the above statement without question does not amount to a holding on the issue here presented, it provided the necessary rationale—the *ratio decedendi*—upon which the *Witherspoon* holding was based. Since the jury does and should do nothing other than reflect the community conscience on the question of life or death, it is imperative that that jury be drawn from *all* elements of the community. Were the jury beset by standards,

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[70] See footnote 50, *supra*, and accompanying text.

restricting and confining their discretion, it would not have been necessary to so scrupulously prevent the exclusion of certain elements of the community from the jury.[71] As the Tenth Circuit stated in *Segura v. Patterson*, 402 F.2d 249 (10th Cir. 1968):

> It is axiomatic that the line between contemporary community values and the penal system is filled by the jury's being allowed to be reflective of prevailing social thought. To assert that the adoption of rigid guidelines seeking to control the jury in this respect, thereby substituting merciless standards for present day flexibility, is compelled by due process is clearly untenable. 402 F.2d at 254.

Several other decisions of this Court lend support to a holding that the challenged Ohio practice is constitutional. *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966), strongly relied on by petitioner as supporting his assertions, plainly states that:

> In so holding we intend to cast no doubt whatever on the constitutionality of the settled practice of many States to leave to juries finding defendants guilty of a crime the power to fix punishment within legally prescribed limits. 382 U.S. at 405 n.8.[72]

Moreover, the *Giaccio* case has been cited with apparent approval by this Court in *Spencer v. Texas*, 385 U.S. 554

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[71] As the Eighth Circuit said in *Maxwell v. Bishop*, 398 F.2d 138 (8th Cir. 1968), *vacated on other grounds*, 398 U.S. 262 (1970): "Jurors are not automatons. They are human beings. The jury system appropriately assumes that jurors in their factual determinations bring into play their common sense and the experiences of life." 398 F.2d at 149.

[72] The argument that *Giaccio's* application of vagueness standards to a penalty question compels a holding of unconstitutionality of the practice herein under review has been rejected in *In re Anderson*, 69 Cal. 2d 613, 447 P.2d 117 (1968); *State v. Forcella*, 52 N.J. 263, 245 A.2d 181 (1969); and by the Eighth Circuit in *Maxwell v. Bishop*, 398 F.2d 138 (8th Cir. 1968), *vacated on other grounds*, 398 U.S. 262 (1970).

(1967), wherein it is noted that "The States have always been given wide leeway in dividing responsibility between judge and jury in criminal cases." 385 U.S. at 560.

4. The imposition of standards to restrict the jury's discretion can only result in more death penalties.

The final difficulty with petitioner's argument in regard to lack of standards is that it ignores the very practical consideration that the imposition of standards would probably result in more, not fewer death penalties. When the jury considers the issue of life or death without standards to guide it, its members are free to act on their feeling of pity, humanity and general reluctance to take life. As this Court has noted:

> The authority of the jury to decide that the accused shall not be punished capitally is not limited to cases in which the court, or the jury, is of opinion that there are palliating or mitigating circumstances. But it extends to every case in which, upon a view of the whole evidence, the jury is of opinion that it would not be just or wise to impose capital punishment. How far considerations of age, sex, ignorance, illness or intoxication, of human passion or weakness, of sympathy or clemency, or the irrevocableness of an executed sentence of death, or an apprehension that explanatory facts may exist which have not been brought to light, or any other consideration whatever, should be allowed weight in deciding the question whether the accused should or should not be capitally punished, is committed by the act of Congress to the sound discretion of the jury, and of the jury alone. *Winston v. United States*, 172 U.S. 303, 313 (1899).

It is readily apparent that considerations such as those set forth by this Court would be extremely difficult to incorporate into any set of enumerated standards. In

the absence of established standards there have been decisions such as *People v. Green*, 47 Cal. 2d 209, 302 P.2d 307 (1956), in which the California Supreme Court held that, since the jury's discretion was "absolute" and did not need extenuating circumstances as a precondition to its exercise, the trial court erred in directing the jury to fix the penalty at death unless they found extenuating circumstances. And in *Ochoa v. United States*, 167 F.2d 341 (9th Cir. 1948) the Ninth Circuit held that under 18 U.S.C.A. § 1111 it was unnecessary for the jury to find any specific mitigating circumstances before recommending against capital punishment.

Once the standards are imposed, however—be they those of the Model Penal Code § 210.6 or some other reasonable set of aggravating and mitigating circumstances—decisions such as *Green* and *Ochoa* will lose much of their validity. It is not contended that a reviewing court would or could reverse unless the jury could point to the specific mitigating circumstances on which it relied. However, it is probable that a jury, given a specific list of factors to which it should adhere, would be less inclined to give weight to the very prevalent emotions such as pity and charity, which would otherwise weigh heavily on each separate juror. Mercy, by its very nature, is the dispensation of compassion or kindness. Even if it were susceptible to standardization, the imposition of fixed guidelines to so delicate a discretion would only serve to replace an accused's opportunity for forgiveness with a formula to which the jury might feel it must adhere. Undoubtedly, this would redound to the detriment of capital offenders.

In any event the list of standards, being basically advisory, would be no advantage to a convicted defendant. The jury could disregard the list if it wished, and sen-

tence a man to die because of some vague dislike for the expression on his face, the sound of his name or the color of his skin. And, on the other hand, such a formulation of standards could cause great injustice to a defendant, because the very enumeration of aggravating and mitigating factors would probably cause the jury to decide for the death sentence whenever the total of aggravating circumstances outweighed the total of mitigating circumstances. Thus the natural tendency to spare life would be greatly diminished by establishing prescribed guidelines for leniency, since an individual juror could rationalize his decision for the death penalty by pointing, in his mind, to "the law's" standard which the defendant failed to meet.

One further problem that would be encountered in formulating standards is that the list of mitigating circumstances would have to be exclusive, whereas it could not possibly cover all the possible ameliorating factors that might arise in a given case. Under such a system, however, defendant's attorney would be constrained to bring his client within the list, while under Ohio's present practice he can take any circumstance he finds in the case and argue that it is mitigating.

In sum, the very standards for which petitioner argues so strenuously would tend to deny to large numbers of defendants the mercy that petitioner himself desired to receive. Surely the interests of capital defendants are no more served by condemning greater numbers of them, on behalf of "due process," than such interest would be served by reviving the mandatory death penalty in a quest for "equal protection."

CONCLUSION.

No constitutional right has been denied to petitioner, nor has he been forced to waive one such right in order to exercise another. Petitioner has no constitutional "right of allocution" and his right against self-incrimination was not chilled by the Ohio procedure. Ohio's unitary jury system is a rational sentencing procedure which provided petitioner with ample opportunity to introduce mitigating evidence pertaining to punishment. Petitioner fully utilized this opportunity.

The Ohio practice of allowing the jury to exercise its discretion on the issue of punishment without restrictive standards constitutes a valid exercise of legislative power. It grants no greater discretion than is allocated to any other sentence-determining body and deprived petitioner of no constitutional protection to which he was entitled.

Therefore the judgment should be affirmed.

Respectfully submitted,

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